Filed 7/16/12 Southern Cal. Gas Co. v. Superior Court CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SOUTHERN CALIFORNIA GAS COMPANY, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; ALLSTATE INSURANCE COMPANY et al., Real Parties in Interest.	No. B240674 (L.A. Super. Ct. No. BC442504)

ORIGINAL PROCEEDINGS; petition for writ of mandate. John Shepard Wiley, Jr., Judge. Writ granted.

Sheppard, Mullin, Richter & Hampton, Steven O. Kramer, Jonathan D. Moss; Marlin E. Howes; and John A. Yacovelle for Petitioner.

Berger Kahn, Craig Simon; Greines, Martin, Stein & Richland, Robert A. Olson and Gary J. Wax for Real Parties in Interest.

No appearance for Respondent.

Southern California Gas Company (Southern California Gas) petitions for a writ of mandate directing the superior court to vacate its order requiring further responses to five requests for admission and, impliedly, an interrogatory requesting information supporting anything other than an unqualified admission of each request. Southern California Gas contends the order would require it to reveal material protected by the work product doctrine. We grant the petition.

FACTS AND PROCEDURAL HISTORY

This case involves what is known at the Sesnon fire of October 2008, which burned the Porter Ranch area of Los Angeles, California. According to the Los Angeles County Fire Department, the fire was caused by an electrical line, owned by Southern California Gas, which fell during high winds.

After they had paid claims relating to fire loses, numerous insurers filed a subrogation action against Southern California Gas. During discovery, the insurers propounded requests for admission. Those requests were accompanied by California's Form Interrogatory No. 17.1, which requires the responding party to identify all facts, witnesses, and documents that support anything other than an unqualified admission made in response to the requests for admission.

At issue in this petition are five of the requests for admission. They are as follows.

No. 12. "Admit that in a routine preventative maintenance program one looks at insulators with binoculars to ensure that the conductor's insulator remains intact."

No. 17. "Admit that regular inspection of the power line, [*sic*] both visually and using infra-red (heat) scanning devices would have discovered any fatigue points before a failure occurred."

No. 57. "Admit that the Sesnon Fire was caused when a CONDUCTOR strung between H-Frames 643-644 and 670-671, [*sic*] broke and fell to the ground on October 13, 2008."

No. 88. "Admit that the Sesnon fire was caused by an electrical conductor, owned and operated by SCGC, falling to the ground."

No. 102. "Admit that YOUR conduct was a substantial cause to [*sic*] the ignition of the Sesnon Fire."

Southern California Gas objected to those requests on various grounds and in three separate attempts to respond. The question at issue in this proceeding became distilled during the course of meet and confer, as well as consideration of discovery propounded by other parties to the litigation: whether Southern California Gas has to respond to discovery requests requiring it to confer with its non-designated expert witnesses, who may or may not be designated when the time comes, in order to answer. That objection sounds in the work product protection as information from litigation consultants is part of an attorney's investigation of the case.[1]

The issue first came before respondent court on an informal basis. At the request of the parties, the court agreed to provide its take on whether Southern California Gas could assert the work product protection when a request for admission would require it to consult with its non-designated experts to provide an answer. The parties e-mailed a joint brief to the court, indicating their positions. The court e-mailed an informal ruling and

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1 In their return, the insurers claim that Southern California Gas did not adequately raise the work product protection as to many of the requests for admission at issue in this proceeding. To the contrary, the record shows that the objection was raised in the initial round of responses that were offered and served as a limitation to subsequent responses. Moreover, the argument was not raised in respondent court so cannot be asserted here. Indeed, the insurers forfeited any such argument by agreeing the work product protection was a cognizable issue during the informal discussions with respondent court, and in their formal motion.

also took argument on the issue at a scheduled status conference. The court indicated that it was appropriate for a party to admit or deny a fact or contention addressed by a request for admission even if it needed to consult with an expert witness in order to respond, citing *Chodos v. Superior Court* (1963) 215 Cal.App.2d 318, 323.

The informal procedure did not resolve the issue. Accordingly, the insurers filed a motion to compel further answers to the requests for admission and the accompanying interrogatory. Southern California Gas made a cross-motion for protective order. After taking briefing and argument, respondent court reiterated its informal conclusion. On March 13, 2012, the court granted the insurers' motion as to numerous requests for admission, including the five at issue here, and compelled Southern California Gas to provide further responses. Though no mention was made of the accompanying interrogatory, the parties agree that the implication of the order was to also require further responses to the interrogatory. The court presumably denied the motion for protective order as well, though no order to that effect was actually entered. This petition followed, challenging the court's ruling as to the five requests for admission listed above and the implied finding that the interrogatory also had to be answered without assertion of the work product protection.

DISCUSSION

The California Code of Civil Procedure explicitly permits assertion of the work product protection as a response to a request for admission. (Code Civ. Proc., §§ 2033.210, subd. (b); 2033.230, subd. (b).) However, respondent court did not address the merits of that objection with regard to the five requests for admission at issue here. Instead, the court issued a broad directive that the protection could not be asserted, reiterating its informal estimation that the objection could not be properly stated. It is true that requests for admission may ask a party to admit the truth of specified fact, opinion relating to fact, or application of law to fact. (Code Civ. Proc., § 2033.010.) But it is not clear that the court gave due consideration to the particular requests at issue here.

The court made no attempt to consider the propriety of assertion of the work product protection in the context of each request. The court did not attempt to determine just what material was supposedly protected and whether that material was truly work product. Nor was there consideration of whether any work product protection was overcome because to allow it would be prejudicial to the insurers or would work an injustice. (Code Civ. Proc., § 2018.030, subd. (b); see *Coito v. Superior Court* (June 25, 2012, S181712) __ Cal.4th __ [2012 Cal. Lexis 5823, *42-*43]; *National Steel Products v. Superior Court* (1984) 164 Cal.App.3d 476, 487-492.) The court simply brushed aside the specifics in favor of the general proposition that a party must make a good faith effort to respond to discovery. (*Chodos v. Superior Court*, *supra*, 215 Cal.App.2d at p. 323.) That ruling will not suffice in the face of the express terms of the Code of Civil Procedure.

More importantly from the work product protection standpoint, respondent court's order did not address the interrogatory that accompanied the requests for admission, though the motion to compel sought further responses to the interrogatory as well. The order left the parties, and this court, to imply that further responses to the interrogatory were required. However, the interrogatory significantly expanded the scope of the discovery being sought by the requests for admission. No longer were the insurers only seeking a statement of Southern California Gas's position on various issues. The interrogatory requires identification of every fact supporting anything other than an unqualified admission, which would include any opinion a litigation consultant has rendered. The interrogatory also requires the name and contact information of every witness with knowledge of those facts. Similarly, every document or tangible thing that supports anything other than an unqualified admission must be identified, its location pinpointed, and the contact information for its custodian reported.

Cases have held that consultants working for an attorney produce work product up to the point that they are designated as trial experts. (*Williamson v. Superior Court* (1978) 21 Cal.3d 829, 834; *Scotsman Mfg. Co. v. Superior Court* (1966) 242 Cal.App.2d 527, 529, 531.) Their opinions, and even identities, may be withheld as protected

information. (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 37; *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 297.) To compel a further response to an interrogatory that would require identification of non-designated experts, a statement as to whether they prepared reports, and potentially the content of their opinions, is improper without a thorough evaluation of the merits of any work product protection that has been asserted.[2] That is not to say that the work product protection will apply to each and every piece of requested information, that appropriate limiting orders would not extend adequate protection, or that an asserted work product protection could not be overcome in the context of this case. Respondent court must undertake an appropriate evaluation of the discovery requests, the responses, and objections and determine whether the work product protection applies in whole or in part. (See *Coito v. Superior Court, supra,* ___ Cal.4th at p.___ [2012 Cal. Lexis 5823 at pp. *42-*43].)

This court takes no position on the merits of Southern California Gas's assertion of the work product protection. The fact that Southern California Gas claims to have swept its entire investigation behind its counsel's defense of the litigation is disquieting, as is the claim that the investigation is still ongoing almost four years after the fire. Additionally, the record suggests that independent investigations may have been performed outside of defense counsel's preparation, and those investigations might have supported more thorough responses to the discovery requests at issue. Such equities are for respondent court to consider. (Code Civ. Proc., § 2018.030, subd. (b).) The point is that it must actually do so.

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[2] The record does not contain a copy of Southern California Gas's initial responses to the interrogatory. (Code Civ. Proc., §§ 2030.210, subd. (a), 2030.240, subd. (b).) Thus, it is not clear whether the work product protection was asserted there. It was, however, asserted in the amended response. Thus, it appears the issue was preserved. That is another matter for respondent court to consider, though the nature of the briefing before respondent court suggests the insurers recognized the objection was properly advanced.

DISPOSITION

The petition for writ of mandate is granted and a writ of mandate hereby issues. Respondent court is directed to set a hearing with regard to the five requests for admission at issue in the petition and the accompanying interrogatory to again consider the motion to compel further responses. The court must consider the asserted work product protection on the merits, determine whether it is properly asserted in whole or in part to each subject request for admission and the interrogatory, reviewing the allegedly protected information in camera if necessary, and if there is a work product protection whether it is overcome in the circumstances of this case. The court is free to consider sanctions awards as appropriate. This opinion shall become final 10 days after it is filed. (Cal. Rules of Court, rule 8.490(b)(3).) Each party is to bear its own costs in this proceeding.

KRIEGLER, J.

I concur:

TURNER, P. J.

MOSK, J., Concurring

I concur.

I agree that the trial court must determine if the work product doctrine can be invoked with respect to the interrogatories and if so whether it should apply in this case.

As to the requests for admissions, I do not believe that in this case the doctrine properly can be asserted. That is not to say that the work product doctrine may never be asserted in response to a request for admission. The statute says it can. That means that if a request for admission requests the party to admit or deny that an undesignated expert has come to a certain conclusion, such a request could legitimately trigger a work-product objection. But if the request for an admission requests a party to admit or deny a fact or conclusion that might require the party to consult an expert or involve an undesignated expert's opinion, that is not a proper basis for a work-product objection. In this case, it is clear that petitioner has information, apart from any expert's report, from which it can respond to the requests for admission.

In Hogan and Weber, California Civil Discovery (2d ed. 2005) § 9.7, p. 9-15, the authors made the point that I espouse in connection with a privilege. They state, "Privileges for confidential communications, however, protect only the communications themselves. They do not preclude requests tailored to secure an admission of the facts that were the subject of the confidential communication. Thus, a request that a party admit *telling an attorney* that he or she ran a red light is objectionable. A request that the party admit that *he or she ran a red light* is not. The responding party should admit or deny the fact without revealing any confidential communication by which the party learned that fact."

Code of Civil Procedure section 2030.010, subdivision (b) provides that "[a]n interrogatory is not objectionable because an answer to it . . . would be based on information obtained or legal theories developed in anticipation of litigation or in

preparation for trial." "A request that another party admit negligence presents the same issue. . . . A work product objection to such an admission request would fare no better than it would to a similar interrogatory." (2 Hogan and Weber, *supra*, § 13.5, pp. 13-19 to 13-20.)

Thus, when this matter is remanded, I believe the trial court should reject the objections to the requests for admission on the ground that the work-product doctrine has no applicability to the specific requests in issue. In this regard, I do not believe the majority's position is inconsistent with mine.

A party should not to be able to avoid admitting or denying factual matters that go to the issues of liability. The trial court should rule promptly on the discovery issues, as a trial date is looming.

MOSK, J.